

22d September 1753.

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of the Extract

INFORMATION

FOR

JOHN STUART-SCHAW Heir of Entail of the Barony of *Greenock*, as the Grandson and Heir of *Margaret Schaw*, (Lady *Houston*,) who was the only Daughter of Sir *John Schaw* of *Greenock* the elder, and Sir *Michael Stuart* of *Blackhall*, Bart. Father and Administrator in Law to the said *John* his Infant Son, Pursuers;

AGAINST

CHARLES SCHAW of *Sauchie*, Lord *Cathcart*, Defender, the Grandson and Heir of Sir *John Schaw* of *Greenock* the younger, by *Marion* Lady *Cathcart*, Daughter of the said Sir *John*.

THE Barony of *Greenock*, (whereof the Rent-roll is at this Day near to 900 l. Sterling per annum) was, of this Date, 11th May 1685. upon the Resignation of the Grandfather of Sir *John Schaw* last deceased, granted by Charter to his Father, (here called Sir *John* the elder) in Fee, reserving to the Grandfather a Liferent, and likewise the following Power, calculated for the Increase of the Town of *Greenock*, lying upon the River or Frith of *Clyde*, which even then appears to have been an Object of Attention to this Family, *Reservan. præfato domino Joanni Schaw, durant. tempore ejus vitæ, potestatem et libertatem faciendi et concedendi feuds firmas domorum, tenementorum, etiamque hortorum infra urbem de Greenock, atque dandi et concedendi locationes seu assedationes novemdecim annorum, absque diminutione.*

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minutione rentalis, sicut eadem tempore vitæ patris dicti domini Joannis Schaw allocatæ fuerunt.

25th Apr.
1686.

When the last Sir *John Schaw's* Father had not stood vested in the Fee of this Estate for one whole Year, he thought fit to denude himself apparently thereof, and to vest the same, by a new Charter, in *John* then his Infant Son, but with the Reservation of ample Powers to himself; and this Measure has been always understood by the Family, and the Neighbourhood, to have been pursued by Way of Precaution, in order to preserve the Estate in the Family, as the State of the Nation was then upon a precarious Footing.

The Reservations in this Charter to Sir *John* the Father, were, *inter alia*, his own Liferent of the whole Estate, a Liferent Annuity to his own Wife, besides the Liferents of his own Father and Mother, and a Power to grant *Tacks or Leases* for his own Lifetime, and 19 Years thereafter, with Diminution of one Third of the Rental; and the Fee is given to his Son, with the Burden of all his own former *Debts and Deeds, debitorum et factorum*, and with the farther Burden of 50,000 *Merks*, for the Provision of his own younger Children. And in respect of the Town of *Greenock*, the Power reserved to the Father was in the Words following, *Necnon reservan. plenam potestatem et libertatem dict. Joanni Schaw domos seu ædificia in Greenock in feudum demittere, dummodo eadem non reddunt minus annuatim nomine feudifirmæ quam unam mercam propter lie fall terræ ædificat, et tres solidos et quatuor denarios monetæ Scotiæ propter unamquamque lie fall terræ non ædificat.*

The Manner in which this last recited Power was exercised by Sir *John* the Father was thus; that as the Town of *Greenock* was upon the growing Hand, and Tradesmen and others were found willing to acquire *Feus* of small Parcels of Ground, upon which they were afterwards to erect Houses or Buildings, such as they found convenient, and themselves in Condition to build, so Sir *John's* Manner was to give Charters of the Ground for Payment of the smaller yearly Rent or Feu-duty so long as it should remain *terra non ædificat*. and obliging the Feuar or Vassal to pay the higher Rent or Feu-duty for each Fall of Dwelling-houses they should build in their Closes or Yards, at the Term of *Martinmas* yearly, *after building of the same*; and in this Manner he granted a Feu to *Allan Spier* a Blacksmith;



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smith, in *December* this same Year 1686, and thereafter divers other
Feus in the like Terms.

Sir *John Schaw* the elder being still living, *John* his eldest Son intermarried with Mrs. *Margaret Dalrymple*, eldest Daughter of Sir *Hugh Dalrymple* Lord President of the Court of Session, and in the Contract of Marriage betwixt them, to which Sir *John Schaw* the Father was Party, he and his eldest Son concurred in making a Settlement of the Succession to the Estate, by Way of *strict Tailie*, at a Time when Sir *John* the Father had Issue, besides *John* his eldest Son, *five other Sons*, and *Margaret* an only Daughter, (who was thereafter married to Sir *John Houstoun*) and at the same time, in this Marriage Settlement of his eldest Son, Sir *John* the Father made ample Concessions in favour of *John* his eldest Son and Heir, allowing the Son out of his total Liferent of the Estate 8000 Merks *per annum* during Life towards his Subsistence; and farther, the Father released or discharged the Faculty reserved to him in the Charter 1686 of burdening the Estate with 50,000 Merks towards providing his own younger Children, and obliged himself to relieve the tailed Estate of all former Debts contracted by him or his Predecessors, and renounced the whole Powers and Faculties reserved to himself by the Charter 1686, other than so much of his own Liferent as he still retained over what he had yielded for his Son's Subsistence. And besides this, he gave his Son the Barony of *Braidstane*, which the Son was not put in the Fee of by the Charter 1686, and causes his own Lady renounce her Liferent of that Part of the Estate which had been reserved to her by that Charter, and provided to her by her Contract of Marriage.

And by the Tailie contained in this Contract, the Succession was limited in this Manner: To the said *John* the eldest Son, and the Heirs-male of his Body; which failing, to the 5 other Sons of Sir *John* the Father, *nominatim* in their Order, and the Heirs-male of their Bodies respectively; which all failing, to *Margaret Schaw nominatim*, his only Daughter, and her Heirs whatsoever; and all this with and under strict and ample prohibitory and irritant Clauses, *de non alienando et de non contrahendo debitum* otherways than by particular Clauses in the Tailie is in certain Cases allowed.

In the Description of the Estate itself, whereof the Succession was in this solemn Manner settled and secured, it is observable, that besides

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1700.

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besides the *Barony of Greenock*, as then erected, special Mention is made in the Enumeration of the Particulars following, concerning which Questions have now occurred or been made, *viz.* First, the Tower, Fortalice, and *Manor Place of Greenock*, with the Bounds, Places, Yards and Orchards thereof, all which are ordained to be the *principal Messuage* of the same Barony or taillied Estate. 2dly, Of the whole Grounds and Lands within the Ebbing and Flowing of the Sea. And 3dly, of the *Burgh of Barony of Greenock*, with all the Profits, Commodities and Pertinents thereof.

The Clause itself expressing these Particulars is in the Words following: " All and whole the Lands and Barony of *Greenock*, as the " same are now erected, comprehending the Lands and others underwritten, *viz.* the Lands of *Wester Greenock-Schaw*, with the " old Castle-stead, Castle, Tower, Fortalice and Manor-place of the " same, Bounds, Places, Yeards and Orchards, with the Mill thereof, and Pertinents of the same, with the haill Grounds and Lands " within the Ebbing and Flowing of the Sea, lying contiguous, near " to the Lands of *Wester Greenock*, in so far as the same are bounded towards the Sea, together with the Burgh of Barony of *Greenock*, with all and sundry Markets, Fairs, Tolls, Customs, Liberties, Privileges, Immunities, Profits, Commodities, Easements, " and righteous Pertinents whatsoever belonging to the said Burgh " of Barony, united and erected into an haill and free Barony, called the Barony of *Greenock*; and the Tower, Fortalice, and Manor Place of *Greenock* are ordained to be the principal Messuage " of the same, together with the Patronage of the Kirk of *Greenock*, " and Tiends, Parsonage and Vicarage of the same, &c, &c, &c.

The other Clauses in this Tailie that are material to be here inserted are in the Words following: " Providing that it shall not " be lawful to, nor in the Power of the said *John Schaw*, nor any " of the Heirs of Tailie or Provision above specified, to alter, innovate or change this present Tailie and Order of Succession, nor " to sell, alienate, dispoise, either irredeemably or under Reversion, nor yet to wadset or burden with Infeftment of Annual-rent, or any other Servitude or Burden, the taillied Lands and Estate above written, or any Part thereof, nor to set Tacks or " Rentals of the samen for any longer Space than the Setter's Lifetime, or for 19 Years, and without Diminution of the Rental, except

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Prohibitory and irritant Clauses.

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" except in case of Necessity, where a sufficient Tenant cannot be
 " found to pay the whole Rent, nor yet to contract Debts, except-
 " ing so far as they are impowered in Manner after-mentioned, nor
 " to do any other Fact or Deed, civil or criminal, directly or indi-
 " rectly, in any sort, whereby the said tailed Lands and Estate, or
 " any Part thereof may be affected, apprised, adjudged, forfeited, or
 " any Manner of way evicted from the said Heirs of Tailie, or this
 " present Tailie, and Order of Succession thereto, prejudged, hurt or
 " changed: And declaring always, that if the said *John Schaw*, or
 " any of the Heirs of Tailie, shall contraveen or fail to fulfil the Pro-
 " visions and Conditions of this present Tailie, or any of them, any
 " Manner of way, and specially but Prejudice of the Generality
 " foresaid, by disposing, selling, wadsetting, or burthening with In-
 " festments of Annualrent, or other Servitudes or Burdens, the said
 " Lands, or any Part thereof, or by granting Tacks or Rentals o-
 " therways than as above, or by contracting of Debts, except so far
 " as they are impowered in manner under-written, all such Deeds
 " shall be void and null, sicklike as if the same had never been grant-
 " ed, in so far as concerns the said Lands and Barony, which, nor
 " no Part thereof, shall be anyways affected or burthened therewith,
 " in Prejudice of the Heirs of Tailie and Provision, appointed to
 " succeed by virtue of thir Presents, which are made and granted,
 " *sub modo*, with and under the Provisions above specified, and no
 " otherways."

" Reserving always, notwithstanding of the Premises, full Liberty to
 " Power and Liberty to the said Sir *John Schaw*, and after his
 " Death to the said *John Schaw* his Son, and the Heirs of Tailie
 " and Provision above specified, to grant Feus or long Tacks for
 " such Spaces as they shall think fit, of any Part or Portion of the
 " said Lands, the Feu or Tack-duty not being under 20 s. Scots for
 " each Fall of Dwelling-houses, and 5 s. Scots for the Fall of
 " Year and Office-houses.

" And also it is provided and declared, and shall be declared by
 " the Infestments to follow hereupon, and all the subsequent Con-
 " veyances of the said Estate, that it shall be lawful to, and in the
 " Power of the said *John Schaw*, or any of the said Heirs of Tai-
 " lie, to contract the Sum of 50,000 Merks Scots of Debt, and
 " therewith to affect and burden, in manner after specified, the said
 " Lands and Estate, for providing of their Daughters or younger

" Children ; but it shall not be lawful to any of the succeeding
 " Heirs of Tailie to contract any more Debts for Provision of their
 " Children, under the Irritancies above mentioned, until first the
 " Debts contracted by their Predecessors for Provision of their
 " Children be paid and cleared ; at least it shall only be lawful for
 " them to contract so much for the End foresaid, as, with the Pre-
 " decessor's Debt above specified unpaid, shall amount to the Sum
 " of 50,000 Merks in hail ; declaring always, that the legal Re-
 " versions of any Diligence or Adjudication to be used for Securi-
 " ty of the Debt allowed by thir Presents to be contracted for pro-
 " viding of Children, shall never expire to carry away the irredeem-
 " able Right of the said Lands and Estate, or any Part thereof, but
 " the said Adjudication shall be always redeemable upon paying the
 " Sums for which the same shall be obtained, with the Annualrents
 " thereof ; declaring also, that this present Tailie, and Irritancies
 " thereof, are and shall be noways prejudicial to any Execution
 " competent upon this Contract, in so far as the same is conceived
 " in favours of the said Mrs. *Margaret Dalrymple*, and the Daugh-
 " ters of the Marriage, failing Heirs-male thereof ; which Provisi-
 " ons, in favour of Daughters of this Marriage, are declared to ex-
 "haust the Faculty above mentioned, of burdening the Estate for
 " Provision of Children, in case the same shall be exercised as a
 " Burden upon the said tailed Estate *pro tanto*."

Provision
 of 30,000
 Merks for
 the Daugh-
 ters of the
 Marriage.

" And in respect, that failing of Heirs-male to be procreated of
 " this present Marriage, the Daughters, or Heirs-female to be pro-
 " created of the same, are and shall be, by this present Contract,
 " and Infeftments to follow hereupon, cut off and excluded from
 " their Right of Succession to the said tailed Lands and Estate ;
 " and it being just and reasonable that the said Daughters should
 " be, in that Case, competently provided for, according to their
 " Qualities, therefore the said Sir *John Schaw*, and *John Schaw*, by
 " thir Presents, binds and obliges them, conjunctly and severally,
 " and their Heirs-male and of Tailie, to content and pay to the
 " said Daughters, one or more, who shall be procreated of the said
 " Marriage, failing of Heirs-male thereof, the particular Portions
 " after-mentioned, *viz.* If there be only one Daughter, the Sum
 " of 30,000 Merks, if two, 40,000 Merks, and if there be three
 " or more, the Sum of 50,000 Merks ; and which Portions are
 " and

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“ and shall be payable to the said Daughters at their several Ages
 “ of 16 Years compleat, or at their respective Marriages, which of
 “ them shall first happen, and with 100 Merks of Penalty for each
 “ 1000 Merks, and Annualrent during the not Payment after the
 “ several Terms of Payment; and in the mean Time, till the said
 “ Portions fall due, to maintain, educate, and breed the said
 “ Daughters suitable to their Qualities, &c. &c.”

“ And it is hereby provided and declared, That the said Lands
 “ and Estate of *Greenock*, and others above-written, shall be the
 “ Subject wherewith the said 50,000 Merks is to be burdened; so
 “ that if the said *John Schaw* younger shall pay the same himself,
 “ he shall have Liberty to contract that Burden upon the Estate;
 “ or if Sir *John* his Father shall pay the same, he shall have Access
 “ to dispose upon as much of the said Lands and Estate as will re-
 “ fund the said Sum to him, notwithstanding of the Disposition
 “ thereof above-mentioned made by him to his said eldest Son, and
 “ the other Heirs of Tailie.”

Sir *John Schaw* the Father settled his whole personal Estate, ^{21st Feb.}
 which was very ample, being to the Amount of no less than 20,000 ^{1702.}
Sterling, upon *John* his eldest Son, and his Heirs and Assigns what-
 soever; and at the same Time, or within two Days thereafter, the
 Contract containing this Tailie was produced to the Court of Ses-
 sion, with a Petition for both Father and Son, praying the same to
 be registred as the Act 1685 directs, which was ordered and done
 accordingly.

Sir *John Schaw* the Father being now dead, and also all his five ^{1715.}
 younger Sons without Issue, and his eldest Son, now Sir *John Schaw*,
 having Issue of the said Marriage only one Daughter, *Margaret* his
 only Sister, who had Issue Male and Female, was become the next
 presumptive Heir in the said tailed Estate, in case Sir *John*, now her
 only Brother, should die without Issue-male; whereupon the Sister,
 with Concourse of her Husband, brought her Action in this Court
 against Sir *John Schaw* and others, who, she suspected, might have
 the Custody of the principal Tailie, (the Principals not being left in
 the Register of Tailies) in order to have Exhibition of the said prin-
 cipal Tailie, and that the same might be decerned to be registred in
 the Books of Session, whereby the Principal might be left in the
 Custody of the Lord Clerk Register, or his Deputes, to the Effect
 the

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the said *Margaret Schaw* Pursuer, and her Husband for his Interest, might have a formal Extract thereof, to be kept and used by them as their own proper Writing in Time-coming.

And on the other hand, Sir *John Schaw* was pleased to bring a Counter Action of Declarator, that he was not bound by the Tailie contained in his own Marriage Contract, and that the said Tailie notwithstanding, he had the full and free Disposal of his Estate, and might settle the Succession thereof, or alien, or charge the same with Debts at his Pleasure.

These mutual Actions were, after very full Litigation, determined by Decree of this Court of the 30th *July* 1715, whereby the Lords "found the Irritancies and the Clause not to alter the Tailie
"and Order of Succession to the Lands and Estate of *Greenock*
"and others, contained in the present Sir *John Schaw's* Contract of
"Marriage with the said Dame *Margaret Dalrymple* his Lady, are
"binding on the said Sir *John Schaw* who made the Tailie, even
"supposing the Pursuer *Margaret Schaw*, were a gratuitous Substitute;
"and found, that the said Tailie was a delivered Evident; and
"ordained the foresaid principal Contract of Marriage containing
"the said Tailie, to be registred in the Books of Council and Session,
"that any concerned may take Extracts thereof; and assoiled
"ed *Margaret Schaw*, and the said *John Houston* younger of That-
"ilk her Husband for his Interest, from the foresaid Declarator
"raised at the Instance of the said Sir *John Schaw* against them."

1717. Upon an Appeal brought by Sir *John Schaw* to the House of Lords, this Judgment of the Court of Session was affirmed.

From this Time forward, till near the Death of Sir *John Schaw*, which happened in *April* 1752, he applied himself, it would appear, to make all such Deeds as could be thought of or devised to render the Succession of this Estate as little beneficial as possible to his Sister and her Descendants, and to draw out of it all the Advantages that could be thought of for his own Daughter and her Issue; and it is not to be wondered, if in many of these Deeds, which were on the one hand prompted by Resentment against the Sister, though very causeless, and on the other by partial Affection, which was natural to his own Issue, Sir *John Schaw* exceeded the Powers that were left or granted to him by the Tailie of 1700; and whether in Fact that

that was the Case, will best appear by stating those Deeds and Proceedings of his in their Order, which were as follows :

Marion, the only Child of *Sir John Schaw*, was married to *Charles*, then called the Master of *Cathcart*, and thereafter, upon the Death of his Father, Lord *Cathcart* ; and upon the 2d and 3d of *September* that same Year, *Sir John Schaw* gave three heretable Bonds to the Master of *Cathcart*, his Son in-law, all referring to the Powers in the Tailie above recited, one for 30,000 Merks of Principal, of the 2d *September*, and the Day following a second for 17,000 Merks, and a third for 3000 Merks of the same Date, and all carrying Interest from the 29th *March* preceeding, being the Day of his Marriage ; and upon all these three the Master of *Cathcart* was infest in the tailed Estate.

The Master of *Cathcart*, in *December* that same Year, gave a Discharge or Release to *Sir John Schaw*, reciting, that *Sir John*, by the Marriage Articles betwixt his Daughter and him, the said Master of *Cathcart*, in *March* preceeding, had obliged himself to pay him the Sum of 72,000 Merks (or 4000 *l. Sterling*) in Name of Portion with his said Daughter, and reciting the said three heretable Bonds for Sums amounting to 50,000 Merks, and two other personal Bonds, one for 18,000 Merks, and another for 4000 Merks, amounting in all, the said five Bonds, to the said total Sum of 72,000 Merks, "therefore the said Master of *Cathcart* discharges the said *Sir John Schaw* of the said Articles of Contract of Marriage, " without Prejudice always of the foresaid three first mentioned Bonds, which are granted to affect the said *Sir John Schaw*, his Heirs and Successors in the Estate of *Greenock* only, and noways to affect and burden his other Heirs, Executors and Successors ; and likewise without Prejudice of the said other two Bonds, which are to affect the said *Sir John*, his other Heirs, Executors and Successors,"

Sir John Schaw granted a free Right to his Daughter the Mistress of *Cathcart*, and her Husband, and their Heirs, of all and whole these Parts and Portions of the Lands and Barony of *Greenock*, lying adjacent to the Shore, upon which the Town of *Greenock* is built, and may be further extended (bounded as therein described) to the Extent of 26 Acres, 2 Roods, and 27 Falls, which Bounding, and total Measure, comprehends not only the Dwelling-houses, Offices

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1718.

4th Dec-
1718.

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3d August
1719.

and Yeards then presently belonging to him in Property, but also those formerly feued by him and his Predecessors, extending in whole to 6 Acres, 3 Roods, 31 Falls, and 14 Ells, which is therefore excepted from this present Feu that comprehends the Remainder, to wit, 19 Acres, 2 Roods, 35 Falls, and 22 Ells; Part of which Ground, extending to somewhat more than one Acre, had been already built upon at the Date of this Feu; and for that Part the Mistres of *Cathcart* was to pay 20 s. Scots per Fall for Dwelling-houses already built, and 5 s. Scots per Fall for Office-houses and Yeards; and for the rest of the 19 Acres, she was to pay 2 s. Scots for each Fall, and no more.

1721. The Master of *Cathcart* brought into this Court, against Sir *John Schaw*, as nominal Defender, a Process of Adjudication of the tailied Estate of *Greenock*, for Payment of the heretable Bonds that had been granted to him upon that Estate; and, in the 1st Place, insisted for the Interest of the 30,000 Merks from his Marriage in the Year 1718.

In that Action Sir *John Schaw*'s Sister, the Lady *Houston*, presumptive Heir, and Sir *John Houston* her Husband, intervened or appeared for their Interest: They caused a Tender to be made to the Master of *Cathcart* of the bygone Interests, for which he was craving Adjudication of the Lands, upon his assigning the same to them, to the End that they might recover the Interests out of the Rents of the Estate, without suffering the Estate itself to be adjudged; but this Offer or Tender, made in Presence of a Nottary and Witnesses, the Master of *Cathcart* was pleased to refuse; and thereupon it was pleaded in this Court by Lady *Houston* and her Husband, *inter alia*, as follows: "That it was evident this Adjudication could
 " be lookt upon no otherways than as brought at the Desire of
 " Sir *John Schaw* himself, in order to charge the Estate with a greater Sum than what, by his own Consent, he restricted himself to:
 " That this Adjudication was sought not to secure the Sum adjudged for, but the Lands themselves, and to destroy the solemn de-
 " liberate Settlement, in plain Breach of the Covenant and Agreement between the Father and the Son. That Justice could not
 " suffer Sir *John Schaw*, by oblique Devices, varnished over with
 " the Colour of Law, to defeat the Settlement or Tailie established
 " by his own Consent, and found to be binding upon him by so-
 " lemn

"lemn Decisions of the highest Judicatories;" and upon these, and the like Arguments, the Adjudication was stopt, or did not proceed.

Long after all these Proceedings, Sir *John Schaw* having settled, as was most natural, his proper Estate of *Sauchie*, which was not entailed; as well as the Bulk of his personal Estate, upon the present Lord *Cathcart* his Grandson, was pleased, much about the same Time, and not many Months before his Death, to execute a *Variety of Deeds* in favours of Lord *Cathcart*, relative to the tailed Estate of *Greenock*; most of which, it must be allowed, were of a very singular Nature, having been as follows:

Sir *John*, upon the Resignation made by the present Lord *Cathcart*, the Defender, of the Feu Right of the Town of *Greenock*, granted to his Mother *anno* 1719, made a new Grant to his Lordship, containing a Clause of *novo damus*, with some Alterations calculated to render it more beneficial to the Vassal, and more burdensome to the Heir of Entail the Superior.

By a second Deed, of the same Date, Sir *John Schaw* conveys, and perpetually disposes in Feu-farm to the Lord *Cathcart* and his Heirs, the Capital Messuage or Mansion-house of *Greenock*, together with a Part of the Court before the Front of the said House, and Gardens on the rising Ground lying on the East, South and North Sides of the said House, comprehending the Back Entry on the East Side of the Garden, the whole extending to certain Dimensions mentioned in the Deed, and all this for Payment of 20 s. Scots for each Fall of the said Dwelling-houses, amounting to 12 l. 14 s. Scots, or 1 l. 1 s. 2 d. Sterling, and 5 s. Scots, or 5 d. Sterling for each Fall of the other Grounds, being the Courts and Gardens.

By a third Deed of the same Date, Sir *John* grants heretably in Feu to the Lord *Cathcart* and his Heirs, the Stables and Coach-houses, and the two Pavilions or Offices belonging to the said Mansion-house, for the like Rent or Feu-duty of 20 s. Scots for each Fall of the Pavilions, extending to 2 l. 14 s. Scots, or 4 s. 6 d. Sterling, and 5 s. Scots for each Fall of the Stables and Coach-houses, amounting to 2 l. 8 s. Scots, or 4 s. Sterling.

4thly, Of the same Date, Sir *John* granted another Feu of a Piece of low Ground, lying below his upper Gardens, and the Brae or Bank whereon the House stands, comprehending the Back Entry to the

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the Eastward of the said low Grounds, for Payment yearly, by the Lord *Cathcart* and his Heirs, of 5 s. Scots for each Fall.

5thly, Of the same Date, he set in Tack or Lease to Lord *Cathcart*, and his Heirs, the Mansion-house, Stables and other Subjects mentioned in the three Feu-rights just recited, and that for the Space of 19 Years from *Whitsunday* 1751, which is declared to be the Entry to the same, and the Rent or Tack-duty being the same as the Feu-duties for the respective Articles.

6thly, Of the same Date he grants a separate Feu of the Area, composing Part of the Court of the House of *Greenock*, and the present Entry to the same, for Payment of the yearly Feu-duty of 5 s. Scots per Fall.

7thly, Of the same Date, by another Deed, he feus to Lord *Cathcart* that Part of the Bank lying betwixt the said Mansion-house and the South-side of the Town of *Greenock*, upon which there is a good deal of Planting, for Ornament and Shelter of the House, and this also for the Feu-duty of 5 s. Scots per Fall.

8thly, Of the same Date, Sir *John* lets in Tack or Lease, the several Parcels of Ground comprehended in the two last mentioned Feus, and that for the Space of 19 Years after *Whitsunday* 1751, and for the yearly Rent or Tack-duty of 4 l. 0 s. 8 d. Sterl. payable at *Martinmas* yearly, beginning at *Martinmas* 1752.

The Pursuer knows not by what Rule the Rent in this last mentioned Tack was settled at 4 l. 0 s. 8 d. Sterl. because the Feu-duty of the same Parcels of Ground, at the Rate of 5 d. per Fall, would have amounted to 26 l. 16 s. 6 d. Sterl. according to the Dimensions of the Ground mentioned in the two preceding Feus.

Together with these Feus of the *Town of Greenock*, and of the *Manor Place*, and its *Pertinents*, in different Morfels, Sir *John* was further pleased to dispoise to the Lord *Cathcart*, the Family Loft or Gallery in the Parish Church, the Tithes, Parsonage and Vicarage of the several Parcels of Land disposed, and gives the Liberty of hunting, hawking, building Houses, Mills, Breweries, Malt-barns, Kiln and Coble, and the Privilege to load and unload at the Port of *Greenock*, Anchorage-free, and to build Weirs and Docks, and gain upon the Sea; he also renounces the Duplications of the Feu-duty, at the Entry of an Heir, and taxes the Composition due by a singular Successor to 40 l. Scots; and declares, that the Non-payment of

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of the Feu-duty shall infer no Irritancy of the Feu ; and the Vassals to be relieved of all Cess, Ministers Stipends, Schoolmasters Salaries, Repairs of Kirks and Manse, and all other Burdens, Taxations and Impositions whatsoever, imposed, or to be imposed hereafter, and that both for bygones and in all Time coming, with the Relief whereof he burdens the yearly Feu-duties.

Sir John Schaw made a ninth Deed in favours of the Lord Cathcart, being a Tack or Lease of the most valuable Farms of the Western Barony of Greenock, and this for 19 Years after his Entry, which is declared to be to the arable Lands at Martinmas 1750, and to the Houses, Yeads and Grass, at May-day 1751; it gives the Lessee Power to put out and input Tenants, and to hold Courts, and appoint Baron Bailies for the same, and all this for the yearly Payment of 4407 l. 8 s. 3 d. Scots in Money, with 294 Stones 6 Pounds 15 Ounces Meal, with 5 Bolls 2 Firlots Farm Bear, and certain other Casualties for the yearly Rent; and the Lord Cathcart is further obliged to leave the Houses that shall be on the said Lands, at the Expiration of the Tack, in as good Condition as they then were.

30th Oct. 1751.
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Two Days after this Lease of near the one Half of the Estate, Sir John Schaw made a 10th Deed, by which he disposed to the Lord Cathcart and his Heirs, perpetually, by Feu-right, the same Farms in the Western Barony of Greenock, which were let by the said Tack or Lease, together with the Parks, Inclosures, Avenues, and whole planted Grounds about his Dwelling-house of Greenock; the Feu-duty is the same with the Rent in the former Tack, with the Addition of 20 s. Scots the Fall of Dwelling-houses, and 5 s. Scots the Fall of Office and Yeads, which amounts to 312 l. 16 s. Scots.

1st Nov. 1751.

And further Sir John Schaw, by Contract of this Date, sells and disposes to Lord Cathcart, the whole natural Wood and planted Trees, such as Lime, Plain, Elm, Leburnum, &c. growing in the Avenues, or elsewhere, throughout the whole Estate of Greenock, excepting such Trees, in the Tenants Yeads, as had been already sold to others, with Power to Lord Cathcart to enter directly to the Possession, and to cut, peel, clean, and away carry the whole Wood there sold, betwixt the Date thereof and the 1st January 1763; for which Causes Lord Cathcart is taken bound to pay to Sir John,

2d Nov. 1751.

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his Heirs, Executors or Assign, the Sum of 1000 *l.* *Sterl.* against *Martinmas 1751.*

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Besides these various Deeds, Sir *John Schaw* provided his Lady, (who hath survived him) in the Liferent of Lands, paying at this Day 379 *l.* 3 *s.* 9 *d.* *Sterl.* in Lieu of the Jointure of 250 *l.* *per annum* to which she was intitled, by the Contract of Marriage; and to which the Pursuer, hath been obliged to submit; because it is impracticable for him now, at the Distance of 53 Years after her Marriage, to prove that these Liferent Lands exceeded the 250 *l.* at the Date of the Marriage Contract.

April 1752.
Upon the Death of Sir *John Schaw* in *April 1752*, without Issue-male, the Pursuer, as next Heir of Entail, became intitled to the Succession to the tailed Estate of *Greenock*, subject only to the fore-said Liferent and public Burdens.

But the Lord *Catheart* claimed, as a real Burden upon the tailed Estate, not only the principal Sum of 50,000 Merks, which was his Mother's Portion from Sir *John Schaw* her Father, charged on the tailed Estate, but the whole Interest of that Sum from the late Lord *Catheart's* Marriage, in *March 1718*, till the Death of Sir *John Schaw* in *April 1752*, being the Space of full 34 Years, at 5 *per Cent.* amounting to the farther Sum of 85,000 Merks: And if this be a just and effectual Claim, the Pursuer, the present Proprietor of the Estate of *Greenock*, has not at present 90 *l.* *per annum* to receive for his own Use out of that Estate.

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And after the other Deeds above recited, made by Sir *John Schaw*, have been produced and inspected for the Pursuer, it farther appears, that if these stand good, or can be maintained, the Heir and Proprietor of this Estate stands deprived of the *sole Mansion-house* upon it, and of all the Pertinents belonging to it, for his convenient and becoming Residence; the *Burgh of Greenock*, which was the Capital of this Barony, stands also alienated from him, and is put under another Master; the very Pew of his Family in the Parish Church is given away; and a Deed made that was intended or calculated not to leave a single Tree for Use, Ornament, or Shelter, upon the whole Estate.

In these grievous and uncomfortable Circumstances for this infant Heir, Sir *Michael Stewart*, his Father, hath found himself under a Necessity to resort to the Justice of this Court for Relief, and to bring to a fair Trial by the Rules of Law and Equity, how far the

the various Deeds above recited, made by the late Sir *John Schaw*, relating to the Estate of *Greenock*, can be held consistent with the Tailie of that Estate, made in 1700, by the late Sir *John Schaw* himself, as well as his Father, which Tailie was confirmed by this Court in 1713, and thereafter by the House of Lords in 1717, and for that Purpose brought his Action of Reduction and Declarator of these Deeds, against the Lord *Cathcart*, the Grantee in these, and the Heir-general and Representative of the Granter; which having been argued several Days, in your Lordships Presence, in *July* last, you were pleased, in respect of the Variety of Matter, to direct Informations on the Debate; and the Pursuer, having already stated the *Facts* and *Deeds*, shall proceed as briefly as possible to treat the several *Questions* that have arisen upon them, which chiefly concern or may be reduced to these three Classes; 1st, The *Few Rights* granted by Sir *John Schaw*; 2^{dly}, The *Tacks or Leases*; and 3^{dly}, The *34 Years Interest* of the 50,000 Merks, being the Lady *Cathcart's* Portion, charged on the tailed Estate.

Previous to the Discussion of the particular Questions in this Cause the Council for the noble Lord, the Defender, insisted on certain general Topics, to conciliate Favour to this Cause, in defending a Heap of Deeds, that, from the very Recital of them, must appear so flagrant and shocking; they observed, that the Defender was the Heir at Law of the Family of *Greenock*, if no Tailie had been made; that Tailies, being a Departure from the natural or lineal Succession, and an Abridgment or Restraint of the free Use of Property, were unfavourable and strictly to be interpreted, and had been so interpreted in divers Instances of late Years; and concerning the Tailie in question of this Estate of *Greenock* made in 1700, they went so far as to say, (indeed without Evidence or Credibility) that it was by Oversight or *per incuriam*, that the late Sir *John Schaw* had executed a Tailie, preferring the only Daughter of his Father, and her Issue, to his own Issue-female, altho' *Margaret*, his Sister, is by Name substituted, failing the Male-descendents of himself, or of Sir *John* his Father; and yet upon the Supposition thus assumed of an Inadvertence or Surprise on the Part of Sir *John* the younger, in thus settling the Succession, they endeavoured to justify what in fact could not be denied as to his Conduct, that he had set himself industriously, by all Manner of Deeds in his Power in favour of his own Descendents, to render the Succession to the tailed Estate as little

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little beneficial as possible to his Sister or her Descendents, and they were even pleased to say, that it was not very becoming or grateful in the now Pursuer to impugn the Deeds of the late Sir *John Schaw* his Grand-uncle, to whom the Pursuer was indebted for his Succession to the Estate as it now stands, whereof Sir *John* the younger was vested in the Fee before the Tailie of 1700 was made, which therefore became valid, as being his Act and Deed.

p. 146 To these preliminary Observations it was replied for the Pursuers, that this was not a Time or Place to debate concerning the Policy or Expedience of the Law of *Scotland*, as it presently stands with relation to Entails; and it is by that Law, in a Court of Justice, that *jura quasita*, by the now Pursuers, in virtue of the Tailie in question, must be determined; and in the examining what these are, he seeks not to impugn any Principle that has been established for the strict Interpretation of Tailies; but as these are *lawful Titles*, by which many valuable Estates are held, they must, like all other Deeds, receive a fair, candid and just Interpretation, and be allowed the lawful Operation and *Effect* for which they were calculated: More especially when, as in the present Case, the Tailie was not the voluntary Act of a single Person, but was made in a *Contract* to which Sir *John Schaw* the Father, as well as the late Sir *John* the Son, were Parties; in the very making of which Settlement the Father, by renouncing a great Part of his Liferent and reserved Faculties, gave a *valuable Consideration* for the Chance of Succession, then very distant, of his *own Daughter Margaret* and her Issue, failing the Issue-male of his eldest Son, then a young Man, and his own *five younger Sons* then living: Nor could it be imagined, that the Tailie to the Daughter of Sir *John* the Father, preferably to Sir *John* the Son's, was, *per incuriam*, or the Inadvertency of the Friends of the Lady with whom the Son intermarried, as the Lord President *Dalrymple* her Father was Party to the Marriage Contract, and Sir *James* and Sir *David Dalrymple*, and other eminent Lawiers, all her Relations, were Witnesses to the signing thereof.

And just as this Tailie was about to be entered in the public Register, within a Year after its Date, in order to give it full Effect, Sir *John Schaw* the Father gave his eldest Son another most ample Remuneration for consenting to the Settlement by this Tailie to his Father's Good-liking, by the Father's settling upon his Son, in Fee-simple,

simple, all his personal and separate Estate, which the Son himself (in the former Litigation upon this Tailie) did, by his Council, judicially aver to have amounted to 20,000 *l. Sterl.* and by which Grant Sir John was enabled to acquire the separate Estate of *Sauchie*, in which he is now very worthily succeeded by the noble Lord the Defender.

It was farther observed for the Pursuer on this Head, that by the Tailie of 1700, the *same Powers* are reserved to Sir John Schaw the Father, of granting Feus or Leases of any Part or Portion of the Estate, that after his Death were to belong to Sir John Schaw his Son; and if the Son, which was a very probable Event, had got Issue-male of his Marriage with Mrs. Margaret Dalrymple, and yet Sir John the Father had taken the Fancy, thro' Partiality or Fondness for Margaret his only Daughter, or her Issue, on Pretence of exercising those Powers and Faculties, to have made the like Deeds in favour of them (as are made in favour of the Defender) by *feuing out* in Parcels the *Mansion-house and its Pertinents*, and the *Burgh of Greenock*, &c. the Grandson of Sir John Schaw the Father, in the supposed Case, would have been by *Propinquity* his Heir at Law; but his only Title to challenge these Deeds, would have been in the *Quality of Heir of Tailie*; and he could have made no other *Objections* to them, than such as the now Pursuer has offered in that same *Quality*; the *Question* would still have been, whether such Deeds were, or were not, within the true Intent and Meaning of the Powers reserved by the Tailie. That *Question* the next succeeding Heir of Tailie was intitled to bring, whatever was his *Propinquity* or Relation to the Tailier, and whether connected with him by Males or by Females; the *Question* depends upon the Deeds, and not upon the Persons interested, and by its true Merits, without Respect of Persons, must in a Court of Justice be decided.

Another very possible Event might have varied the Person, who, had he existed, would surely have found Fault with these Deeds made in favours of the Lord Cathcart; if the Lady Schaw, who now is, had predeceased Sir John Schaw, and he had married a second Lady, and by her had Issue-male, that Son of his would have been the *lineal Heir* of the Family, and also the *Heir of Tailie* in the Estate of *Greenock*; and such Title he would have precisely, and none other, to reduce these extravagant Deeds to the Lord Cathcart, that the now Pursuer has, who is become the *Heir of Tailie*, thro'

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Default of such Issue-male: And the Cause surely can be no worse by reason of any accidental Circumstances of the Parties, when the Title of the Pursuer, and the real Merits of the Questions are precisely the same in the supposed Cases, wherein the Complainer of these Deeds would have been the direct Heir-male and of Line of this Family, as well as the Heir of Tailie, under which last Character alone he could have brought or maintained his Action, and that Character belongs to the now Pursuer, who denies that the late Sir John Schaw had Power in Prejudice of him, any more than of his own Son, to expel him for ever from his principal Messuage, or from the Property or Lordship over his own Burgh of Barony, or wilfully to charge him, without Relief, with 34 Years Interest of a very large Sum, during which Period Sir John himself was in the total Possession of the Estate.

Feu of the
Capital
Messuage.

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And more particularly, 1st, as to the perpetual Feu-rights granted of the principal Messuage with its Offices and Pertinents, as above recited, in the September 1751, it is remarkable that Sir John Schaw himself, or his Advisers, have manifestly betrayed a Diffidence or Consciousness that he was attempting a very extravagant Thing, which was not likely to be sustained, as being within his Powers by the Tailie, that was found binding upon him, after he had used his utmost Efforts to shake himself loose of it; and this Diffidence or Consciousness appears from these two Circumstances, 1st of all, the Conceit of feuing out the Dwelling-place and its Pertinents, in various Morfels, and measuring it out at so much per Fall, as if it had been so many distinct little Habitations in the Town of Greenock, to a Tradesman or a Sailor; and, 2^{dly}, As a perpetual Feu-right, even with this Precaution, such as it was, could hardly be expected to stand good, of the same Date another Attempt is made, to give a temporary Right by a 19 Years Lease of those very Subjects or Parcels that had been granted in Feu, and whereof the principal Messuage with its Pertinents consisted.

And Sir John Schaw had doubtless good Reason to be thus diffident; for the Estate or Barony itself, being settled to a certain Series of Heirs unalienably, and the principal Messuage or Manor Place being expressly enumerated, as one principal Article of what belonged to the Estate so tailied, and which indeed, by the Nature of the Thing, must, above all other Articles in such a Settlement, have been intended

intended to remain with the Lord of the Manor; it was therefore most clearly within the *Rule*, as being a capital Part of the Estate tailed under a Prohibition to alienate; and that a perpetual Feu is an Alienation, is a Proposition undeniable, and was admitted by the Defender's Council in the Debate.

The only Question then is, whether such Feu of the principal Messuage fell within the *Exception*, or the *Powers* granted by the Tailie in these Words; "To grant Feus or long Tacks, for such Spaces as they shall think fit, of any Part or Portion of the said Lands, the Feu or Tack-duty not being under 20 s. Scots for each Fall of Dwelling-houses, and 5 s. Scots for the Fall of Yards and Office-houses?"

The whole Clause is manifestly calculated to promote the Erection of urban Tenements, primarily to be sure in the Town of Greenock, which was an Object formerly in View of the Family, and by its Situation on the Frith of Clyde, where a good Harbour could be made, was likely to increase, and that there would be a Demand at that Place for Feus or long Leases of small Parcels of Ground, in order to build upon; at the same time, as the Clause is not restricted to the Town of Greenock, or its Neighbourhood, but respects any Part or Portion of the said Lands, the Pursuer does not contest that Sir John Schaw, might have lawfully granted Feus or long Tacks of so many Falls of Ground as he should agree for, with the respective Feuars or Tacksmen he should contract with, in order to the Erection of Dwelling-houses, Yards, or Office-houses, and by Degrees to form Villages or Townships consisting of Fisher-men or Manufacturers, upon any convenient Part of the Estate, where there might be a Demand, or an Inducement for such Erections: For it is observable, that as to the Farms, or rural Tenements upon the Estate, the Tacks or Rentals to be granted of these, are governed by a separate Clause in the Tailie, and they are to be of a more limited Endurance, and the Rent settled by a different Rule, namely, "That they are not to be for any longer Space than the Lessor or Setter's Lifetime, or for nineteen Years, and without Diminution of the Rental, except in Case of Necessity, where a sufficient Tenant cannot be found to pay the whole Rent."

Instead of which, in this Clause relating to the building Feus or Leases, the Leases or long Tacks may be granted for such Spaces

as they shall think fit, plainly because no Man would build Houses, or Offices, or Yards, upon a Lease for the Setter's Lifetime, or for nineteen Years, and especially Houses built of such durable Materials as Stone, with which that Country abounds.

Again, the Rent or Tack-duty to be reserved is not regulated, as in the Case of the Farms or rural Tenements, to be *without Diminution of the Rental*, or for so much Rent as the same Piece of Ground was formerly or last let for; but, upon these building Leases, there is to be an *Increase of Rent*, for the Benefit of the Lord of the Barony: The Rent or Tack Duty for these building Leases was to be no less than 20 Shillings Scots for each Fall of Dwelling-houses, and 5 Shillings Scots for the Fall of Yards and Offices, which would amount to a higher Rent per Acre than any Farm upon this Estate, consisting of arable or Pasture Land, had ever yielded, or morally speaking can ever be brought to yield, the former being at the Rate of 160 l. per Acre, and the other at 40 l. per Acre.

And it is no less clear, that the *Feus or perpetual Grants*, which in this Clause are mentioned first, as being the most usual Method, and most likely to take Place by the Usage of this Country, for the Encouragement of *Buildings*, along with the *long Tacks*, which are allowed for the same Purpose, were in like Manner calculated to provide for the *Increase of the Town of Greenock*, or other small Villages or Townships on the Estate, if happily that at any time should appear practicable; for the *Feu-duty* is settled at the *same Rate* with the Rent of the *long Leases* of the like Nature, "Not to be under 20 Shillings Scots for each Fall of Dwelling-houses, and 5 Shillings Scots for the Fall of Yards and Office-houses;" from all which these Propositions are evident, that every such Feu or long Tack here intended or allowed, was, 1st, to be limited by Measure to so many Falls; and 2^{dly}, was to be employed or occupied wholly in Dwelling-houses, Yards or Offices, that is to say, it was to be such an urban Tenement as were already subsisting in the Town of Greenock, where it was then hoped, as it has since come to pass, that many more of the like Nature would come to be erected, and that there would be a Demand of *Parcels of Ground* for that Purpose by Mariners, Artificers, Victualers, Shop-keepers or Merchants, who should chuse to settle in a Place where there was Trade or Business going forward.

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Now, if such be the true Intent and Meaning of this Clause containing the *Power* to grant *Feus* or *long Leases*, by Way of *Exception* from the general *Prohibition to alien*, the Pursuer hopes he may safely submit it to the Judgment of the Court, without any Argument, if it is possible seriously to make or suppose a Question, whether under this Clause it was truly meant or intended, or done, to empower Sir *John Schaw*, or any future Tenant, by this Tailie, to *alienate forever the principal Messuage*, and its Appurtenances, which, first and last, must have cost some Thousand Pounds, and this by cutting the same into Shreds or Parcels, and stipulating the paltry Income of so much *per Fall* of Ground, that was to be paid by a Sailor or a Tradesman who should build a House for himself in the Town of *Greenock*, which would hardly serve to pay the Rent of one of these small Houses for the Heir of Tailie, the Lord of the Manor or Barony, instead of the Capital Messuage possessed by his Ancestors, and expressly tailed along with the Barony itself, to be descendible to him. If upon comparing the *Terms* of this reserved *Power* just recited, with the *Deeds* made by the late Sir *John Schaw*, as a pretended Exercise of that Power, in respect of his principal Messuage, the gross *Enormity* of his partial Construction shall not appear in a striking Light to the Court; the Pursuers Council confess themselves incapable to employ any Words that can serve to evince that *Enormity*.

And the Pursuers shall only add upon this Head, that as they apprehend it was not in the Power of Sir *John Schaw* to alienate the principal Messuage of this Barony, and to exclude the future Barons or Lords forever from the Use of it, in favour of any third Party or Stranger whatever, (for every Man is a Stranger other than the Baron himself, or Lord of the Estate, however nearly related he may be either to the Baron who is now such, or who formerly were,) the Grievance and Inconvenience is in reality the greater, that Sir *John Schaw* attempted to make such Alienation in favour of the noble Lord the Defender, his own Grandson, whose Council in this very Debate have not scrupled to say, that he being the lineal Heir of the Family was *injured* by the Tailie, in being postponed to the Pursuer in the Succession to the whole Estate; and in these Circumstances it is evident, and consistent with the just Respect and Esteem which the Pursuers have for the Defender, for his personal

Merit, as well as their near Relation, they may justly say, that his Lordship's Possession of their principal Messuage, as his own Property, would be more galling and really inconvenient to them, than if Sir *John Schaw* had taken the Fancy to alienate the same to an absolute Stranger, who could have no Pretensions to complain that the whole Estate was not his, or to withdraw from the lawful Owner any of the just and legal Advantages that he is intitled to claim and receive from the Duty or Observance of his Tenants and Vassals, so long as he conducts himself towards them with Justice and Benignity.

Feu of the
Burgh or
Town of
Greenock.

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And this Consideration leads to the second material-Article in the Feus granted by Sir *John Schaw*, which was in Effect of the whole Town of *Greenock*, or almost 20 Acres out of 26, granted first to the Lady *Catcart* in *August* 1719, and renewed, with additional Advantages, to the now Defender in *September* 1751.

This is an Article of considerable Consequence, in respect of the real Benefit or Profit arising from it, as well as in other Respects for the Quiet and Conveniency of the Pursuer in the Possession of his Estate, without having an intermediate Lord interposed betwixt him and his Feuars in his Town of *Greenock*.

For Proof of the former of these Facts let it be observed, that the Lord *Catcart*, upon the Title of this universal Feu, has lately received for *Sub-feus* to the real Vassals or Tenants of small Parcels of Ground, amounting in whole to one Acre and a half, Grassums or Fines amounting to no less than 1294 *l. Sterl.* besides a Feu-duty of 194 *l. 17 s. 3 d. Scots* above what he himself is bound to pay to the Heir of Entail, which is, in short, parcelling out the Ground thus feued *per aversionem* to him, at a Profit of upwards of 1000 *l. Sterl. per Acre*. The Pursuer speaks only of a Fact already past, as he does not know, nor can take upon him to aver, that the Remainder of near 20 Acres, contained in the total Feu to Lord *Catcart*, can be disposed of or parcelled out to so much Advantages or at so high a Rate, but that it may be done with great Advantage *this Specimen* serves to prove.

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These Benefits, arising from the Situation and Prosperity of the Town of *Greenock*, the Heir of Entail, by the Tailie, was intitled to receive. He was allowed to grant Feus in order to the Erection of Dwelling-houses, for a Feu-duty not being under 20 Shillings *Scots per Fall* of the Ground employed for Dwelling-houses, or 5 Shillings

Shillings Scots the Fall of Yeards and Office-houses, but he might take *as much more* of constant Feu-duty as the Parties he dealt with would agree for, or he might stipulate this lowest Feu-duty as the *perpetual Rent*, payable to his Heirs and Successors, and convert the Fines or Price he received to his own Use; and if Sir *John Schaw* himself, whilst he lived, had made the several particular Feus in the Terms of the Tailie, and received the like Fines for his own Use, the Pursuer, his Heir of Tailie, would have had no Claim to the Fines, but would have been the immediate and sole Superior to those Vassals within his Burgh of Barony, and intitled to the Feu-duties and Casualties that should be incurred during his Possession of the Estate.

But what the Pursuer humbly contends is, that it was not within the Powers granted by this Clause, or agreeable with the true Spirit, Intent and Meaning thereof, for Sir *John*, instead of adding from Time to Time new Feuars to the Town, and Vassals to the Baron himself, as he could find Persons willing to bargain with him for erecting Houses, Yeards and Offices, to make *one great Feu*, or grant *per averfionem* to his own Daughter or Grandson a perpetual Feu of the whole, or almost the whole of the Town of *Greenock*, or of the adjoining Grounds lying most commodiously for the Extension thereof, and these, not with Intent or Paction that the same should be *actually built and possessed by them*, but with a manifest Intent to attain the Effect we have already seen in Part produced, namely, to *intercept the future Advantages* from the Increase of that Town coming to his *Heirs of Tailie*, and to *bestow* the same, by *Anticipation*, upon his *own Heir at Law*, and at the same time thereby to *interpose an intermediate Lord or Superior* betwixt the Proprietors of the Barony of *Greenock*, and the *actual Vassals* and Inhabitants of *his Burgh of Barony*; and the intermediate Lord being also the lineal Heir of his Family, the more likely to create Uneasiness and Disquiet to the Possessor of the Estate, by maintaining a constant Rivalship or interfering of Interests in the Burgh hard by the Place of his Residence, and of which Burgh, the Prosperity, Harmony, and good Order must at all Times contribute to the Satisfaction and Advantage of the Proprietor of the Barony, and of all the Tenants upon the Estate.

But further still, it is to be observed, in Fact, that of the 20 Acres bating a Fraction feued out to Lady *Cathcart*, and thereafter

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to her Son, there was a little more than *one Acre already built upon* at the Date of the Feu, and for that the Defender is taken bound to pay 20 s. Scots the Fall for the Dwelling-houses, and 5 s. Scots the Fall for Offices and Yards; but for the *rest*, being upwards of 18 Acres, there is no more payable than 5 s. Scots per Fall, without any *additional Rent* being stipulated for the *Houses* that should *thereafter* be built on the Premises; and this the Pursuers apprehend, was manifestly to evade and defeat the Intent of the Clause in the Tailie, where the *Yards* and *Offices* that were to be granted at 5 s. Scots per Fall are plainly supposed to be *Accessories* or *Pertinents* of a *Dwelling-house* to which they belong, and which was to pay the *higher Duty* of 20 s. per Fall; but here was at once above 18 Acres granted for ever, at the Rate of 5 s. per Fall, upon which there was neither Yard nor Office-house; for there was *no Dwelling-house* built, or undertaken to be built, to which these might pertain. This was plainly to give away at once in the Lump from the Heir of Entail, at 5 d. per Fall, the whole Ground most fit to be feued out in the Exercise of this Clause at 20 d. per Fall, and as much more as in Fact we have seen given for it, which the Pursuer contends was manifestly inconsistent with and contrary to the Tailie, and therefore that it cannot stand good.

p. 159th
And if the reserving Clause in this Tailie wanted any Thing to explain it, (as 'tis humbly conceived it does not) the Sense and Meaning the Parties understood it in is made evident by the several Feus granted both prior and posterior to the Tailie, and both by Sir John Schaw the Father and Sir John the Son after his Father's Death; for all these Feus contain express Provisos, that the Feuars respectively shall pay 15 d. more per Fall for the Houses to be built upon the Ground feued at 5 d. per Fall, how soon the same should be built, in order to compleat the Feu-duty of 20 d. per Fall of Houses mentioned in the Tailie; and as this undoubtedly must explain and ascertain the Meaning of the Clause, so the noble Lord the Defender himself, (so great is the Force of Truth) hath likewise followed the same Rule in the Feu-rights granted to his Subvassals.

It was indeed objected, and much insisted on for the Defender, that Sir John Schaw the Father, soon after the Date of the Tailie, had feued out the Lands of *Braidstane* at a certain small Feu-duty in Money, without respect to the foresaid Proviso; whence the De-

Defender's Procurators argued, that the Power of feuing was not to be limited in manner pleaded for the Pursuer.

But, in the first Place, Sir *John Schaw* the Father stood infest in the Fee-simple of these Lands of *Braidstane* at the Date of the Tailie, the same not being comprehended in the Charter of the Estate of *Greenock* granted to Sir *John Schaw* the Son in 1686; and though they are indeed included in the Tailie 1700, yet as no Infestment had followed upon the Tailie, so Sir *John* the Father was the only Person who could grant a Feu-right of these Lands of *Braidstane* to a Vassal; and that these Lands were feued with his Son's Consent, no Mortal can doubt; for the Father, by the Tailie, if Infestment had followed thereon, was divested not only of the Fee, but even of the Liferent of these Lands, so that it could never have entered his Head to feu them out unless by a Concert with his Son. And next, the Clause in the Tailie, reserving Power to Sir *John* the Father, and after his Death to Sir *John* the Son, to feu out Parts of the Estate at so much *per* Fall of Dwelling-houses, Yards and Office-houses, can only be understood to respect the Lands and Barony of *Greenock*, which were proper for such Feus, as by the Charter to Sir *John* the Son in 1686, and which no Doubt was in view at making the Tailie, Sir *John* the Father's Power of feuing, thereby reserved to him, was restrained (as already noticed) to Buildings in *Greenock*; and consequently the Clause in the Tailie could never empower either Father or Son, separately, to feu out these Lands of *Braidstane*; but the same being a detached Part of the Estate, lying at a great Distance from the Barony of *Greenock*, and in a different Shire, the Father and Son have surely concerted between them the feuing out thereof. Such Concert between the Father and Son may have been in writing, of which the Pursuer cannot be Master; but Sir *John* the Son's not quarreling the Feu-right, and receiving the Feu-duty, infers such Concert.

Wherefore the Pursuer cannot comprehend how this Instance of feuing the Lands of *Braidstane* can be set up by the Defender in Support of his Explanation of the foresaid reserving Clause in the Tailie; for if that Instance was to be a Rule, it would overturn the whole Tailie; and therefore it was in a very special Case, and has no Manner of Reference to the Clause in question; but the multifarious other Instances for enlarging the Town of *Greenock*, sufficiently

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ently explain the true Sense and Meaning of the Clause, as being in the precise Terms thereof, to have been for that only Purpose.

These being the most material and *total Objections* to this Feu of the Town of Greenock, *per averfionem*; against which the Pursuer hopes to be relieved, and to be permitted to retain *his Burgh*, as well as *his Mansion-house* to himself, he shall but just mention, *ex abundante*, the other incidental Wrongs or Grievances attempted to be brought upon him by this Feu of the Town, which are these following:

Thirlage. By the old Feus in this Town, the Vassals are uniformly astricted to the *Mill of the Barony* for their Grain *inveſta et illata*: The Defender for his great Feu is not so astricted; and yet in the subordinate Feus granted to his Sub-vassals he has taken them bound to pay Multures to him.

Harbour. Sir John gives the Defender Liberty of loading and unloading in the Harbour of *Greenock* without paying Anchorage or Shore Dues, and yet these are exacted by the Defender from his Sub-vassals; but surely the Harbour and Privileges thereto belonging doe not fall within the Clause of the Tailie allowing of Feus for Houses or Yards, or Office-houses, under none of which Appellations the Port of *Greenock*, or the Duties there payable, can be comprehended.

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Land-tax. Again, Sir John Schaw has here feued out to the Defender near 20 Acres of Ground, and freed him from the Payment of Cefs or Land-tax, which, by the Nature of the Right, should be payable by the Vassal, who has the Property or *dominium utile* of the Land. At the same Time, Lord Cathcart hath taken all his Sub-vassals bound to pay Cefs to him conform to a certain Valuation, which sufficiently explains the Meaning of the Tailie to be, that the Vassals should pay the Cefs or Land-tax.

Casualties. Again, this Feu Charter declares, that the Non-payment of the Feu-duty shall be no Cause of Nullity or Reduction of the Feu-right; whereas the Pursuer apprehends, that a Liberty in the Tailie to grant Feus, must be understood with such Quality as makes Part of the Law of *Scotland* by Statute, which introduces this Irritancy of the Feu *ob non solutum canonem*.

And the like Objection lyes against another Quality, by which he has taxed the Composition to be paid by a singular Successor to 40 *l. Scots*, though the Law allows the Superior, in such Case, a full Year's

Year's Rent ; and which is worse, in the present Case the Lord of the Barony, if this were a lawful Feu, must receive the Successor of his immediate Vassal, in near 20 Acres of the Town of *Greenock*, for Payment of 40 *l. Scots* ; when, in the mean time, this Vassal may have a hundred Sub-vassals under him, and be intitled to receive a full Year's Rent from any one of them who alienates his Property, intercepting these among other Benefits from the Lord of the Barony.

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Further, this Feu-right declares, that the Duty or *reddendo* in the Sea Shore. Charter, shall always continue the same without any additional Feu-duty for what may be gained off the Sea ; and this Article also the Pursuers apprehend exceeded Sir *John's* Powers, because the whole Barony or Estate is tailed unalienably *as far as the ebbing or flowing of the Sea* upon that Side ; and if any Ground shall be gained by *Alluvion* or by *Industry* upon the Side towards the Sea, the same being an *Accession* to the tailed Estate, would doubtless become Part of it, and be subject to all the Conditions in the Tailie ; and the Clause empowering to grant Feus at so much *per Fall*, supposes, that every Feu shall be given by *Measure*, and becomes an *ager limitatus*, which is inconsistent with giving away for nothing an Accession that may be more considerable than the original Feu, of which several Instances have already occurred ; and very lately the Defender received 200 *l. Sterling* from the Town of *Greenock*, for a Piece of Ground gained off the Sea for building a Breast-work to their Harbour, and this besides 29 *l. 10 s. 8 d. Scots* of yearly Feu-duty.

And lastly, this Right allows the Defender the Privilege of *Quarries*. quarrying through the whole Estate, without paying any Consideration except 1 *s. Sterling* for each Rood of builded Stone-work ; which is imposing a *grievous Servitude* upon the Estate, that may produce manifold Disputes and Inconveniencies, and is, *pro tanto*, an Alienation for which there is no Colour or Warrant in the Tailie, and to which therefore the Pursuer cannot be compelled to submit.

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For all these general and particular Reasons or Objections, the Pursuer humbly hopes the Court will see Cause sufficient to relieve him also of this *second Article* of the almost *total Feu of the Town of Greenock*, as not being consistent with or agreeable to the true Intent and Meaning of the Clause of the Tailie, under Colour of which it was made.

The

Western
Barony.

The third considerable Article is the Feu-rights, granted by Sir John Schaw to the Defender, and manifestly exceeding the Powers in the Tailie, is that of the *western Barony of Greenock*, together with the Parks, Inclosures, Avenues, and whole planted Ground about the Dwelling-house of *Greenock*, which is feued out at the full present Rent, amounting to upwards of 400 *l. Sterling*, being near one Half of the total Estate.

The Objections to this Deed, and Reasons of Reduction of it, must be obvious from what has been already said on the former Articles. It hath been admitted for the Defender, that *infeudare est alienare*; and the Tailie prohibits Alienation of any Part of the Estate, excepting in the Cases excepted, whereof this is none; for if the one Half of the Estate can be thus alienated, the whole may be so *eodem jure*, and then the nominal Lord of the Estate will not have a Foot of Ground which he can call his own, or that he can set his Foot upon, but as a common Passenger, and can only levy his Feu-duty, and go and reside and spend that where he best can.

This Tailie was composed at the Sight of too able Persons to be susceptible of such Absurdities. The Lord President *Dalrymple* had Reason to hope that this Estate would be inherited by Issue-male of his Daughter; and this Tailie, after the Prohibition to alien, provides as other Tailies do, that even Tacks or Rentals may not be let for longer Space than the Setter's Lifetime, or for *nineteen Years*, and that *without Diminution of the Rental*. This was the Period which they judged sufficient to encourage Tenants to the due Culture of the Ground, and a farther Term they would not allow to be granted by the Heir in Possession, that he might not intercept the Profits that might arise to the succeeding Heirs from an Increase of the Rental by Improvements or by Length of Time; by which Means, it hath been said for the Defender in this Cause, that the total Rent of this Estate has been greatly increased since the Date of this Tailie, somewhat more than Half a Century ago; and from the like Causes a future Increase may proportionally arise, which by the plain Terms and Effect of this Tailie, must accrue to the Heirs of Entail for the Time being, who shall be in Possession; but by the Effect or Operation of this Deed, giving a *perpetual Feu* to the Defender, and his Heirs, of about one Half of the Estate, the Heirs of Tailie must be tied down to the *present Rent forever* without Prospect of Increase,

And

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And it hath been already shown, that there is no Colour or Authority from the Clause of the Tailie relating to the Power of granting *Feus, or long Tacks*, for the granting a Feu like this of the whole western Barony, because that Clause is entirely calculated and adapted for the erection of *urban Tenements*, Dwelling-houses, Yards and Offices at a certain Feu-duty, *per Fall*, without one Word of *Acres, or Fields, or Farms*, concerning which there is a Regulation of the *Rate and Indurance* of Leases, but nothing more, nor one Word about the *Feu-duty*, at which these Farms or rural Tenements &c. may be alienated; the Sense of the Tailie is plain from its *Expressions*, and from its *Silence*. It hath regulated the *Feu-duties*, where it meant that Feus might be granted, and hath regulated the *Tack-duties*, where nothing but Tacks or Leases were to be allowed; and there appears, with Submission, to be no Doubt or Ambiguity in the Question, but that this Feu-right or Alienation of above 400 *l. per annum*, of the Estate must be reduced; to make a Colour for granting which, Sir John Schaw hath thought fit to blend two Parts of the Tailie together, the Power of *feuing* at so much *per Rood*, for *Dwelling-houses*, and their *Yards and Offices*, with the Power of *leasing the Lands, without Diminution of the Rental*, and out of *this Composition* he has made a Feu of one Half of the Estate, at the *present Rental*; which was so far generous, for if it be true, that the Power to Feu comprehended the whole Estate, and as the Tailie is silent concerning the *Feu-duties*, to be reserved for any thing but *urban Tenements*, the Consequence is, that the whole might have been feued out for an elusory Duty, that is, alienated forever for nothing, and then there had been an End of the Tailie, excepting a naked nominal Superiority.

The *second Class of Deeds*, made by Sir John Schaw to the Defender in prejudice of the Pursuer contrary to the Tailie, consists of the *Tacks or Leases* which Sir John took upon him to make *in aid*, or to take place *in lieu*, of the *perpetual Feus* which he had attempted to grant of the *Mansion-house* with its Pertinents, and of the *Western Barony of Greenock*; of the lawfulness or validity of which *Feus* these very Tacks of the same Subjects prove that he was justly diffident, tho' he was pleased to leave no Method untry'd to distress his Heirs of Tailie.

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And

H. Tacks
or Leases.

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Mansion-
house and
its Perti-
nents.

And as for the former of these, the Tack of the Mansion-house, Pavilion's, Stables, Courts and Entries, and the Ground adjacent, to the Defender for the Space of Nineteen Years, from and after Whitsunday 1751, the Pursuer humbly contends that the same cannot be more available against him, than the perpetual Feu-right of the same Subject. Sir *John Schaw* whilst he lived, and was entitled to possess the Mansion-house with the Estate as his own, might give the Use or Possession of it to the Defender or whom he pleased, during his, Sir *John's* own Lifetime: But as it so fell out that he died before Whitsunday 1752, or during the first Year of this intended Tack, the Mansion-house then, as well as the Land, became the Property of the Pursuer, who is not bound to make good any Deed of Sir *John Schaw*, that is not warranted by the Tailie, and can no more be excluded from the Possession of his principal Messuage for Life, or during a Term of Years that is nearly equivalent to a Life-rent Tack, than he and his Heirs could be excluded forever, by the Feu-right of the same Subjects.

And the Reason is, that the general Law or Rule established by the Tailie is a *Prohibition to alien*, to wadset or burden the tailed Estate with any *Servitude* or *Burthen whatsoever*, that is to say, it must be transmitted by Sir *John Schaw*, as he received it, to be enjoyed and possessed by the succeeding Heirs of Tailie in their Order, and among the other Parts of it the *capital Messuage*, which is expressly mentioned in the Tailie, as well as by the Nature of the Thing, was one principal Member or Part of the tailed Estate, and therefore it falls once clearly within this general Rule.

And next it does not fall within the *Exception*, or the Power to set Tacks or Rentals for the Setter's Lifetime, or for Nineteen Years, without Diminution of the Rental; because this was plainly and manifestly calculated to reserve the ordinary and reasonable Power of Administration, or Management of the Estate, by letting the Lands to Tenants, for making the Estate yield the Rent, which from time to time it should be worth, for the Support of the Heirs of Tailie in their Order: But this surely was not meant to comprehend a Power to grant Leases of the Mansion-house, which never had made Part of the Rent-roll of the Estate, nor at any Time let for Rent, nor had been erected or fitted up like a Tenement within a Burgh for any such Purpose, but for the Mansion or Residence of the Proprietor of the Estate, or Lord of the Barony for the time being. And truly

truly concerning such an unreasonable and such an unprecedented Attempt as this, the Pursuer may be permitted to say, that in judging of it, the Court may properly have in their Eye the Maxim in the Law, *quod malitiis non est indulgendum*.

As for the other Tack of the western Barony of *Greenock*, the Pursuer does not say, that if any of the Farms or Possessions in that or in any Part of the Estate, were at the free disposal of Sir *John Schaw*, as being possessed by Tenants who had no Tack, or whereof the Tack was expired, that he might not lawfully have let the same to this Defender, as well as to any other Man, for the Term of Nineteen Years without Diminution of the Rental, and upon the other usual and reasonable Conditions to prevent Deteriorations of the Estate.

Tack of
western
Barony.

But the Pursuers Objections to this Tack, of near the one Half of the Estate, to the Defender are these; first of all, that the Power reserved to set Tacks or Rentals to Tenants, he apprehends, did only concern or comprehend such as were to be the actual *Coloni* or Occupiers of the Ground, and that it was not meant by this reserved Power, to allow Sir *John Schaw* or any succeeding Heir, to interpose one universal Lessee or Tacksman over the whole Estate, betwixt the Proprietor and the actual Tenants who were to possess or cultivate the same: For the nature of a Tack or Lease, by the Law implies the actual Occupancy by the Tacksman, in so much that he has no Power of Subsetting, without consent of the Lessor, or an express Power granted in his Tack to that Purpose: The Defender therefore, as to so much of the Land as was free or open at the Date of his Tack, and as he shall be pleased actually to occupy and possess by himself or his Servants, the Pursuer admits he may avail himself of his Tack for the Space of Nineteen Years at the former Rental, but must submit to the Court if it can go any farther, or if the one Half of the Estate, any more than the whole, can, in virtue of the reserved Power in the Tailie, be lawfully given to an universal Tacksman, as an interposed or intermediate Lord over the actual Tenants or Occupiers of the Ground, invested with Powers, such as are given in this Tack, of holding Courts and naming Baron Bailies, and in short substituted in Place of the Lord of the Barony, with the Exception only that there is a Tack-duty payable to him.

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Again it is to be observed, that in Fact the far greater Part of the Lands contained in this Tack, were at the Date of it possessed by
other

other Tenants who had long Tacks that were then current, and were still current at the Death of Sir *John Schaw*, a few Months after the Date of this Tack: And the Pursuer humbly pleads, that over these Lands Sir *John Schaw* had no farther Power than to assign the Rents during his own Life as he should think fit, and that upon his Death they became the immediate Tenants of the Pursuer as then Proprietor of the Estate, and that Sir *John* had no Power to grant a Tack of Lands that were already under Lease, and which did not fall or become open during his own Time.

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A third Objection to this Tack is, that, by the Condition thereof, the Defender is only "obliged to leave the Houses *that shall be*" "on the said Lands at the Expiration of the Tack in as good Condition as they are at present," which leaves him at Liberty, if he should be so minded, to take down all the Houses that are now standing upon one Half of the Estate, which will render it impracticable for the Pursuer, or the succeeding Heir, at the Determination of this Lease, to let the Lands again without being at a great Expence in erecting new Houses in place of those that shall be fallen down; and whether a Tack, containing such Condition, be truly let without Diminution of the Rental, the Pursuer must humbly submit to the Court, and apprehends, that the true Intent and Effect of that Quality is not only, that no less than the former Rent shall be payable during the Currency of the Tack to be granted, but that the Tack shall be made upon such prudent, usual and reasonable Conditions, as that, after it is determined, the Lands may be capable to yield the like Rent again by one or more succeeding Tenants. And further the Houses on the Lands are as much secured by the Tailie, as the Lands on which they stand.

p. 172
A fourth Objection to this Tack is, that it comprehends, besides a Variety of *Farms* that have usually been let, or were let at the Date of it, the Parks, Inclosures, Avenues, and whole planted Ground about the Dwelling-house of *Greenock*; and this the Pursuer apprehends is liable to the same Objection with the Tack of the Mansion-house itself; for if it be not lawful, under the Powers in this Tailie, to set in Tack the Mansion-house itself, as being the Residence of the Lord of the Barony, he cannot possibly reside there with his Family without having the Use and Possession of a competent Portion of Ground most adjacent to the House for the Accomodation

of

of his Family and the Maintenance of his Cattle ; and the letting of the very Inclosures and Avenues, that were formerly provided for the Use and Accomodation of the Proprietor's own Family, and were necessary Appurtenances of the principal Messuage, is liable to the same Objections as the Tack or Lease of the Mansion-house, Offices and Courts, which if it could be lawfully made for Nineteen Years, the same Thing may be done again and again, if we could suppose Men so strangely disposed towards their Successors, so that the Proprietors of this Estate might never have it in their Power to reside or live upon it.

And for these Reasons the Pursuer hopes to be relieved also from *this Lease* of near one Half of the Estate, as well as from the *perpetual Feu-right* that was attempted to be made thereof.

The third, and that a very important Article, above stated, concerns the Defender's Claim upon the tailed Estate for the large Sum of 85,000 Merks, being the legal Interest of his Mother's Portion of 50,000 Merks charged upon this Estate during the Space of 34 Years, from *March 1718*, when the Defender's Mother was married, to *April 1752*, when Sir *John Schaw* died, having been all the while in the full Possession of the Estate under the Tailie, and therefore, as the Pursuer contends, was under an Obligation to the succeeding Heirs of Tailie to have *kept down* or *paid* the *growing Interests* of the Debts or Burdens upon the tailed Estate during his Possession of the Rents and Profits thereof, as well as to pay the annual Cess, or Stipends to Ministers, or Feu-duties to the Crown.

III. General Head
Thirtyfour
Years Interest of
the 50,000
Merks.

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And upon this Head the Pursuer does admit, that the principal Sum of 50,000 Merks, Part of the late Lady *Cathcart's* Portion, is an effectual Burden upon the tailed Estate, and a Debt obligatory upon him, the Heir of Tailie in Possession, together with the lawful Interest thereof from and after his Accession to the Estate by the Death of Sir *John Schaw*, and that without any Relief from the proper Estate, or universal Representatives of Sir *John Schaw*.

But as to the bygone Interest preceeding Sir *John Schaw's* Death, amounting to no less than 85,000 Merks, the same was the proper Debt of Sir *John Schaw*. And as the noble Lord, the Defender, who is now the *Creditor* in the heretable Bonds granted for his Mother's Portion, is also the *heir General* and *Executor* of Sir *John Schaw* his

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Grand-father, and has succeeded to him in an opulent Estate, who ought to have paid or kept down the growing Interests of the 50,000 Merks, during the *thirty four Years* in Question that he possessed the tailed Estate and levied the Rents thereof, that were liable to pay these Interests, the Pursuers Claim which he is now asserting by this action, is, to be freed and delivered at the Hands of this Defender, the *Representative* of Sir John Schaw, as well as of the late Lord Cathcart, from the Payment of these *intermediate Interests*, for that *quem de evictione tenet actio, eum agentem multo magis repellit exceptio*. If Sir John Schaw, was himself liable to pay or keep down these growing Interests, and had left his proper real and personal Estate to any *third Party*, that *universal Representative* of him, would have stood obliged to *relieve* the now Pursuer of these intermediate Interests; and the Lord Cathcart, who in the Right of his Father is *directly Creditor* for these Interests, being himself *also universal Heir* or *Representative* of Sir John Schaw, he cannot be intitled to *exact* these from the tailed Estate of this Pursuer.

The Proposition which the Pursuer lays down as the Foundation of his Argument on this Head, namely that the Tenant in Tail for the time being, as betwixt himself and the succeeding Heirs, is obliged to keep down or pay the current Interest of the Debts, affecting the tailed Estate, during his Incumbency or Possession of the total Rents and Profits of that Estate, is evidently founded on the highest Equity, and hath been held and received by this Court in its Proceedings in many Instances.

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No Estate strictly entailed, with the usual prohibitory Clauses against alienating or charging the same, can be subjected to any Debts or Incumbrances, other than such as were contracted and left standing out, by the *Maker* of the Entail, or such as are contracted by the succeeding Heirs in the Terms, and agreeably to the *Powers allowed by the Tailie*; and as the succeeding Heir has not the Means of relieving himself from the Debts of his Ancestors, which the Heir of an Estate in Fee-simple has, who may alien or charge the same at his Pleasure, in order to pay or relieve himself of the Debts of his Predecessors, to which he is liable; it hath therefore been most justly held and received as a *Principle*, that the Tenant in Tail, for the Time being, stands obliged to keep down the Interests, incurred during his own Possession, and to transmit the Estate to his Successor
not

not deteriorated by his own Negligence or Profuseness, by consuming the Rents, and at the same Time, suffering the Interest of the Debts, to grow to the distress or impoverishing of his *Successors*, and in many Cases to the *Eviction* of the *tailed Estate*.

On the other Hand it hath been a received and allowed Practice, not to require of the Tenant in Tail, for the Time being, to straiten or pinch himself, in order to transmit the Estate to his Successors more free or disencumbered of the Debts allowed by the Entail, than he himself received or held it, and therefore when out of his *Savings* of the Rents of the Estate, or other his *proper Money*, he pays off a *Principal Sum*, affecting the tailed Estate, he hath been allowed to keep that Debt intire, by taking an *Assignment* thereof in the Name of a Trustee, to be thereafter used as a Fund for providing his own younger Children, or other his lawful Occasions: But in such Case, it is not allowed for the Tenant in Tail to profit himself of his own wrong, or to take Credit for, or draw out of the tailed Estate, in Prejudice of succeeding Heirs, the *Interests* of such Debts of the *Tailier*, paid by himself and assigned to his Trustee, as were *incurred*, or became due during his *own Possession* of the tailed Estate.

And upon these Principles this Court has proceeded in many Instances. One of which was the Case of *Gordon of Gartie*, Creditor by heretable Bond on the tailed Estate of *George Murray of Pub-rossie*, where, in a Question with *Kinminity*, the next Substitute in the Tailie, *Garties* security was sustained to the Extent of the Debts of the Maker of the Entail standing out at his Death, and thereafter paid by *George* the Heir of Entail; but without allowing Credit for one Farthing of the Interests, of those Debts of the Entailier, that were incurred or became due after *George Murray* himself came into the Possession of the Estate, these being considered in a Question with the Substitute, as proper Debts of *George* himself, which were *natural Burdens* upon, and ought to have been satisfied by him, out of the *annual Profits* of the Estate during his Possession.

In like Manner, in the Case of the Earl of *Peterburrow*, in July 1743, as Heir of Tailie of the Estate of *Durris*, this Court found that he had Power to sell such Part of the tailed Estate, as should be sufficient for Payment of the Sum of 224 ^{l.} 14 ^{s.} 2 ^{d.} *Sterling* of principal Sums, contracted by Sir *Alexander Fraser* the Maker of

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of the Entail and still remaining unpaid, and that upon this Principal Sum, there was an Arrear of Interest resting at *Whitsunday* 1743, of 1184 *l.* 9*s.* 11 *d.* which had been incurred during the Time that Sir *Peter Frazer* of *Durris*, possessed the tailed Estate, and for Payment of this last Sum, this Court found there was no Power to sell Land: But the personal Estate and Executry of Sir *Peter Frazer*, being exhausted as far as that would go, the Earl of *Peterburrow*, with Consent of the Substitutes then in being, obtained an Act of Parliament for authorising the Sale of so much of the tailed Estate, as might clear off these Arrears of Interest, as well as the Principal Sum standing out upon it.

And upon the same Principle this Court proceeded in the Case of the Earl of *Lauderdale*, and in the very late Case of Mr. *Scot* of *Harden*; which were both of them Declarators, of their being at Liberty to sell Part of the tailed Estate, for Payment of Debts of the Maker of the Entail.

There is yet another strong and peculiar Consideration in the present Case, that may farther serve to evince that Sir *John Schaw* was liable for these Interests, during the 34 Years in Question. He had granted three heritable Bonds, or Infeftments of Annualrent, to the late Lord *Catcart*, for Sums amounting to 50,000 Merks: This Security gave the Creditor not only a real Lien upon the Land itself for his Interests, but a preferable Title to recover the same, out of the Rents and Profits yearly, from Sir *John Schaw* himself the Proprietor of the Estate, who became liable for Payment of these Interests, as the Party who had intromitted with, and received the total Rents or Profits of the Land, out of which the same were payable; and the Defender, who was the Heir-general or universal Representative of Sir *John Schaw*, is liable to this Claim in like Manner as Sir *John* himself was.

To illustrate and inforce this last mentioned Consideration. An Infeftment of Annualrent is an *annuus redditus* out of the Lands upon which it is constituted. It is an Alienation of so much of the Rents as shall satisfy the Interest of the principal Sum yearly. And the Creditors, receiving such Rents, whether by a Poinding of the Ground, or from the Possessors or Intromittors without it, as effectually extinguishes the yearly Interest, as if he had granted Discharges of the same. Now Sir *John Schaw* received the Rents yearly, during the whole Period in Question. The Defender represents

sents Sir *John Shaw*, his Grandfather, universally as Heir and Executor, and is considered in Law as *eadem persona* with him. Wherefore the Case is the same as if the noble Lord, the Defender, had himself received these Rents yearly; and consequently his Claim for the Annualrent of these heretable Bonds is extinguished by Payment.

Nor does it alter the Case, in the present Question, that Sir *John* bound himself and his Heirs of Entail to pay these Bonds, seeing with the same Breath he allots irrevocably the Rents for the Payment of the Annualrents, which was an Act of Justice in respect both of the Creditors and the next Heir of Entail.---The Case would be the same, if the Defender represented any extraneous Intromittors with the Rents; for it cannot be doubted but such Intromittors would be liable to a personal Action for the Annualrent. It is founded on the Nature of the Thing, and ascertained by all the Lawiers who have wrote upon the Subject.

'Tis plain from what is before argued, that an Heir of Entail is liable for the yearly Interest even of personal Bonds, wherewith the Estate is chargeable, during his Incumbency; so that if he should take Assignment to the Debt, it would be extinguished by Confusion as to such Interest. But where the Debts, as in the present Case, are constituted by Investments of Annualrent, or by any other Security which subjects the Rents to the Creditors for their Payment, there the Obligation upon the Heir for Payment of the Interest is yet stronger; as such Heir, by his receiving the Rents, becomes personally liable for the Interest as Intromitter; and he and his general Representatives are bound to relieve the Heir of Entail of the same; and if the Creditors should distress the succeeding Heir of Entail for such Annualrents, he would be obliged, upon Payment, to assign his Action against the Intromittor, or his Representatives, to such Heir in order to his Relief. There was no Answer offered to this Ground, nor indeed can it admit of any.

And if agreeably to these Principles it be true, that by the bare Neglect of Sir *John Shaw* to pay these growing Interests of his Daughter's Portion, whilst he received and consumed the whole Rents of the Estate, upon which these were chargeable, he and his general Representatives would be obliged to relieve the succeeding Heirs of Tailie thereof. This must hold good with a *peculiar Force* in the present

present Case, where your Lordships have seen, from the Facts above recited, that as early as the Year 1721, an Attempt was made manifestly, in Concert with Sir *John Shaw* himself, to adjudge the tailed Estate for the *Interests* that were then incurred upon Lady *Catcart's* Portion, with *Intent* to convert these into a Principal, and thereafter, from Time to Time, to do the like with the *growing Interests* of subsequent Years, that the tailed Estate might be totally eaten up and consumed by Means of that Portion and its Consequences: And altho' that Attempt of adjudging and *accumulating* these *Interests* into *Principals*, was upon the Opposition made by Lady *Houston*, the now Pursuer's Grandmother, disappointed by the Justice of this Court, it is evident the *same Design* was prosecuted by Sir *John* as far as in him lay; for he did not neglect, but *willfully forbore* to make Payment of the *Interests* of his Daughter's Portion for the Space of no less than 34 Years, when they amount to a very great Sum, and this not thro' *Inability* or *Unwillingness* to render *Justice* to his *only Child*, or to *her Husband* or *her Son*, who were the Persons upon Earth that he most loved and esteemed; but all this was done of *set Purpose*, to bring at length a heavy Claim upon the tailed Estate; and in the mean Time no Injury to the Creditor in that Portion, because whatever Sir *John* should save out of the Rents of that Estate or his other Incomes, was very naturally to be bestowed upon the *same Parties*, who were successively *Creditors* in these *Interests*, the *Non-payment* of which *increased* the Estate of Sir *John Shaw* to his *general Successor*, by the whole large Sum to which these amount; and nothing therefore can be more just or equitable, than that the Defender should now pay himself that *great Claim of Interests* out of the Estate of Sir *John Shaw* in his Possession, from which the same *ought* to have been paid *originally* as they *fell due*, and by the *willful Non-payment* of which, the Estate or Executry hath been proportionally *enlarged* or *increased*.

Obj. 1st The Pursuers apprehend, that there was no good or solid Answer offered for the Defender to this very important Article of their Libel or Claim: And first of all, whereas it was observed, that by the Marriage-contract 1700, in the Clause relating to the special Provision to the Daughters, one or more, of this Marriage, the late Sir *John Shaw* and his Father are taken bound as for Payment of the Portion

Portions themselves ;---so also to liberate and free the said Daughters, and their several Portions of all Debts and Burthens that anyways may or can affect them as Heirs of Line to their Father; and at the same time the Defender's Council in the Debate admitted, that these Words could not go to other Debts of Sir John Shaw, or have such an absurd Consequence, as if he should leave to his Daughters, an opulent Estate, his Heir of Tailie in the Estate of Greenock must relieve them of all Sir John's proper or personal Debts, to enable them to take that Estate free. And this being given up as an Absurdity that cannot be maintained, these Words can import no more, than that the Daughters, in respect of these specific Portions, shall not be disappointed thereof by the Creditors of Sir John their Father evicting the same from them, as thereby representing him; which was indeed a superfluous Precaution, because they would take these specific Portions as Creditors by their Mother's Contract of Marriage, as in the Case of the Daughters of Lyon of Easter Ogle. But this will not hinder, that if these Daughters, one or more, shall represent Sir John Shaw their Father, by succeeding to him in a *seperate unentailed Estate*, or in his *personal Estate* or *Executry*, that they must be liable for all his Debts and Deeds, without any Relief from his Heir of Tailie, in the Estate of Greenock.

Answer.

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It was farther alledged for the Defender, that in the common Case of a Male-fee without a Tailie, the Daughter of an elder Brother would not be obliged to relieve her Uncle, succeeding to the Estate, of the Interest of heretable Debts incurred during her Father's Lifetime; and it was said if this was so, where there are no Limitations on the Property, there was no Reason why the Case should be differently resolved where there are.

To which the Pursuers answer, by denying both the Proposition and the Consequence: The Proposition is not true, because the by-gone Arrears of an Annualrent fall to Executors, and are arrestable, and therefore being movable in their Nature *quoad creditorem*, tho' they are intitled to a real Security for their Payment, they are *e contra* movable *quoad debitorem*, and as such will affect the Executry of the elder Brother falling to his Daughter, for the Relief of the younger Brother succeeding to the Estate which is liable to be charged with these Interests.

Answer.

p. 183.

And

And again, the *Consequence* would not be *just*, though the *Antecedent* were *true*, because the elder Brother in a *Male-fee* by *simple Destination* had it in his Power to disappoint the younger totally, because he might alienate or charge the Estate with Debts at his Pleasure ; as again the younger Brother might do, when he succeeds for Payment of those Debts ; so that the *same Reasons* do not subsist for obliging the Elder to *keep down* the *Interests* during his Possession of the Estate, as in the Case of a Succession strictly tailed.

Obj. 3d. It was objected, 3dly, that it is lawful for every Man who is under no Restriction, to impose a Debt or Obligation on his Heir-male, for Instance, without Relief from his Heir of Line ; that in the present Case, to the Extent of 30,000 Merks, and even of the whole 50,000, Sir *John Schaw* had Power to charge it upon the tailed Estate, even as if that had belonged to him in Fee-simple, and that there it must remain without any Relief from the Heir of Line.

p184 Answer. It was answered, that the Pursuers admit the first general Proposition, and have impugned nothing established by the Decisions referred to in the Debate, and that are inserted in the Dictionary under the Word *Discussion*; nay they have farther admitted, that Sir *John Schaw* had Power to charge the Estate with the 50,000 Merks, and that the Principal Sum, must remain a Burden on the Estate till it be paid, and also the Interest from and after Sir *John Schaw's* Death, without any Relief from his general Representatives ; but consistently with all this they contend, that Sir *John Schaw* was not impowered by the Tailie to burden the Estate, instead of 50,000 Merks, with 135,000 Merks, to be left upon his Successor at his Death ; and on the contrary, the Tailie provides, " That if Sir *John Schaw* the younger shall pay the 50,000 Merks himself, he shall have Liberty to contract *that Burden* upon the Estate ;" but it is not said that he may wilfully let it grow till it be near *three Times* that Sum, in order *indirectly* to *undermine* or *destroy* the Tailie, so anxiously established ; and it is this *wilful Device* of his that intitles the succeeding Heir to the Relief of the 85,000 Merks in Question, which were the *growing Interests* during Sir *John's* Possession, and that Relief is due, most consistently with the Principles that have been alledged by the Defender, and admitted by the Pursuer ;
and

and this Relief, it is humbly hoped, the Pursuer will in Justice be found intitled to.

And as a full Answer to all the Defenders Objections, that are or can be made on this Head; Sir John Schaw's own Deeds by granting Infestments for Payment of these Annualrents yearly, and his having notwithstanding uplifted Rents out of which the same were payable, must Bar the Defender, his general Representative from all Claim for these Annualrents, in the same Manner, as if the Defender himself, Creditor in these Annualrents, had received the same.

There remains yet one other Article of the Pursuers Libel, and of IV. the Debate in this Cause, that falls under none of the three Heads ^{Woods and Planting.} hitherto mentioned, of the *Feus*, the *Tacks*, or the *Interests*; and that is the Contract for the Sale of the whole *Woods and Planting* upon the Estate, and empowering the Defender to cut and carry away the same, at any time before the first *January* 1763; and this is an Article upon which it is hoped the Pursuer need say little, unless it be to repeat again that *malitiis non est indulgendum*; and they are confident; that the noble Defender could not find in his Heart to make use of this Contract by carrying it into *Execution*, if it were even found to be such as could subsist in Law, which the Pursuers humbly contend it is not. The Estate is *tailied unalienably*, and the *growing Woods* are *pars soli*, as well as the *Quarries* or the *Mines* if there be such within it. Sir John Schaw while he lived had Power to cut Wood, and so he had to work *Quarries* or *Mines*, but he had no Power to *alienate* the one or the other, and to transfer for a *future Term* of Years, after his own Death, a Power to destroy them: The Tailie gives no Authority for making such Havock, and the Pursuer, his Heir of Tailie, is not bound to permit it upon his Estate, or to make good any Contract of Sir John Schaw's that was not warranted by the Tailie, and was plainly calculated to waste and *deface* the Estate, even after his own Death, in Despite of that Tailie.

In respect whereof, it is humbly hoped the Lords will sustain the Reasons of Reduction, of the several Feus and Tacks and Contract for Sale of Woods above stated; and find and declare the Pursuer free of any Demand, at the Suit of the Defender, who is Heir general and Representative of Sir John Schaw, for the Interests of the 50,000 Merks, incurred during the Lifetime of Sir John Schaw himself and his Possession of the tailied Estate, and extinguished by Sir John's intromitting with Rents whereout the same were payable.

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And this Relief, it is humbly hoped, the Pursuer will in Justice be
 found entitled to.
 And as a full Answer to all the Defendants Objections, that are or
 can be made on this Head; Sir John Schaw's own Deeds by granting
 Instruments for Payment of these Annuities yearly, and his hav-
 ing notwithstanding upheld them out of a Will the same were pay-
 able, must Bar the Defendants, his several Representatives from all
 Claim for these Annuities, in the same Manner, as if the Deven-
 der himself, Grantee in these Annuities, had received the same.
 There remains yet one other Article of the Pursuer's Libel, and of the
 Deven in this Cause, that falls under none of the three Heads
 hitherto mentioned, of the Part, the Libel, or the Answer; and that
 is the Contract for the Sale of the whole Wood and Plantation upon
 the Estate, and empowering the Defendant to cut and carry away the
 same, at any time before the first January 1763; and this is an
 Article upon which it is hoped, the Pursuer need say little, unless
 it be to repeat again that matter now of which we have said, and they are
 content that the noble Defendant could not find in his Heart to
 make use of this Contract by carrying it into Execution, if it was
 even found to be such as could assist in Law, which the Pursuer
 humbly contends it is not. The Estate being manifestly, and the
 several Woods are part of it, as well as the Part or the whole of
 these be such within it. Sir John Schaw had Power
 to cut Woods, and to he had to work the same, but he had
 no Power to alienate the one or the other, and to transfer for a
 term of Years, after his own Death, a Power to destroy them.
 The Title gives no Authority for making such a Sale, and the Pur-
 suer his Her of Title, is not bound to permit it upon his Estate, or
 to make good any Contract of Sir John Schaw's that was not
 warranted by the Title, and was highly contrary to Justice and the
 Law of the Estate, even after his own Death, in despite of that Title.
 In respect whereof, it is humbly hoped the Pursuer will justify
 the Liberty of Retention, of the several Woods and Plantations
 and Contract for Sale of Woods above stated; and find
 and deliver the Pursuer five of my Remedy, as the said
 the Defendant, who is his Counsel and Representative of
 Sir John Schaw, for the Purchase of the 50,000 Merks
 incurred during the Lifetime of Sir John Schaw himself
 and his Possession of the said Estate and outgoings
 by Sir John's intermeddling with the same whereon the
 same were payable.



WILL. GRANT.